LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 27 1953
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

**October Term, 1952**

**No. 517**

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

*Petitioners,*

v.

LEOLA JACKSON.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

## BRIEF OF NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICUS CURIAE*

IRVING KANE
of the Ohio Bar

I. H. PRINZMETAL
of the California Bar

LEWIS H. WEINSTEIN
of the Massachusetts Bar

HERMAN L. WEISMAN
of the New York Bar

*Attorneys for National Community Relations Advisory Council*

WILL MASLOW
LEO PFEFFER
JOSEPH B. ROBISON
*of Counsel*

307 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-8432-3.

## SUBJECT INDEX


| | PAGE |
|---|---|
| STATEMENT OF INTEREST | 1 |
| STATEMENT OF THE CASE | 4 |
| THE QUESTIONS TO WHICH THIS BRIEF IS ADDRESSED | 5 |
| ARGUMENT | 6 |
| POINT ONE—State judicial action violates the Fourteenth Amendment to the United States Constitution if its outcome is made to depend on race | 7 |
| POINT TWO—An award of damages for breach of a racially discriminatory contract constitutes denial of equal protection of the laws by the state because it necessarily tends to compel compliance with such contracts | 10 |
| CONCLUSION | 16 |


## TABLE OF AUTHORITIES

***Cases:***


| | |
|---|---|
| Bailey v. Alabama, 219 U. S. 219 (1911) | 13 |
| Buchanan v. Warley, 245 U. S. 60 (1917) | 8, 10, 11 |
| Harmon v. Tyler, 273 U. S. 668 (1927) | 8 |
| Hirabayashi v. United States, 320 U. S. 81 (1943) | 7 |
| Korematsu v. United States, 323 U. S. 214 (1944) | 7 |
| People ex rel. Everson v. Ewing, 330 U. S. 1 (1947) | 9 |

PAGE

Quick Bear v. Leupp, 210 U. S. 50 (1908) ..... 9

Richmond v. Deans, 281 U. S. 704 (1930) ..... 8

Shelley v. Kraemer, 334 U. S. 1 (1948) ..... 6, 15, 16
Strauder v. West Virginia, 100 U. S. 303 (1880) ..... 8

Truax v. Raich, 239 U. S. 33 (1915) ..... 10

***Texts:***

American Law Institute, Restatement of the Law of Contracts, Vol. I ..... 12, 13

Cohen, Morris R., The Basis of Contract, 46 Harv. L. Rev., 553 (1931) ..... 12, 14, 15, 16

Fuller, L. L., and Perdue, Wm. R., Jr., The Reliance Interest in Contract Damages, 46 Yale L. Jour. 52 (1936) ..... 13, 14

Hand, Learned, The Deficiencies of Trials to Reach the Heart of the Matter, 3 Lectures on Legal Topics 89 (1926) ..... 11

Llewellyn, K. N., "What Price Contract?" 40 Yale L. Jour. 704 (1931) ..... 12

National Community Relations Advisory Council, Equality of Opportunity in Housing (1952) ..... 3

Pound, Roscoe, The Limits of Effective Legal Action III Am. Bar. Ass'n Jour. 55 (1917) ..... 15

IN THE

# Supreme Court of the United States

**October Term, 1952**

---

**No. 517**

---

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

*Petitioners,*

v.

LEOLA JACKSON.

---

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

---

## BRIEF OF NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICUS CURIAE*

---

### Statement of Interest

This brief *amicus curiae* is submitted with the consent of the parties.

The National Community Relations Advisory Council (hereinafter referred to as the NCRAC) is a coordinating body for a number of national and local Jewish organizations concerned with community relations. This brief is submitted in behalf of the following NCRAC member organizations:

American Jewish Congress
Jewish Labor Committee
Jewish War Veterans of the United States
Union of American Hebrew Congregations
Union of Orthodox Jewish Congregations of America
United Synagogue of America
Akron Jewish Community Council
Jewish Community Relations Council for Alameda and Contra Costa Counties, California
Baltimore Jewish Community Council
Community Relations Committee of the Jewish Federation of Camden County, N. J.
Cincinnati Jewish Community Council
Jewish Community Federation, Cleveland, Ohio
Detroit Jewish Community Council
Jewish Community Council of Essex County, New Jersey
Community Relations Committee of the Hartford (Conn.) Jewish Federation
Indiana Jewish Community Relations Council
Indianapolis Jewish Community Relations Council
Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City
Community Relations Committee of the Los Angeles Jewish Community Council
Milwaukee Jewish Council
Minnesota Jewish Council
New Haven Jewish Community Council
Philadelphia Jewish Community Relations Council
Jewish Community Relations Council, Pittsburgh
Jewish Community Council, Rochester
Jewish Community Relations Council of St. Louis
San Francisco Jewish Community Relations Council
Jewish Community Council of Greater Washington (D. C.)
Jewish Community Relations Council of the Jewish Federation of Youngstown, Ohio

The member organizations of the NCRAC have for many years concerned themselves with the civil, political,

economic and religious rights of Jews and of all groups whose members are threatened with persecution, discrimination or humiliation because of race, religion, color, national origin or ancestry. The special interest of the Jewish people in human rights derives primarily from an immemorial tradition which from the beginning has proclaimed the common origin and destiny of all mankind and has affirmed under the highest sanctions of faith and human aspiration the sanctity of every human being and the common and inalienable rights of all men. The Concern of the NCRAC members in discrimination in housing has been expressed by the publication of a handbook, "Equality of Opportunity in Housing" (June, 1952) which declares (at p. 3):

> "Discrimination in housing undermines the dignity that is the birthright of every man, woman and child. It squanders our human and social resources, fans tensions that destroy our national unity and presents powerful propaganda weapons to our enemies. It is unjust, uneconomic and indefensible. Its elimination is long overdue."

The racial restrictive covenant, barring members of minority groups from access to housing available to others, was long the most widely used device for perpetuating racial neighborhood restrictions. This Court's ruling in 1948 that the Constitution bars enforcement of these covenants was therefore widely hailed as one of the great landmarks of civil freedom and equality. To thousands of minority group families, it meant actual release from galling restrictions and enabled them to buy homes in areas previously closed to them.

The present case represents an attempt to turn the clock back by restoring to the restrictive covenant some

of the coercive effect that it was formerly given by the courts. The NCRAC and its constituent organizations are confident that this Court will reject this attempt to salvage a repudiated instrument of racial and religious discrimination.

## Statement of the Case

Petitioners here seek review of a judgment sustaining respondent's demurrer to petitioners' complaint seeking damages for violation of a restrictive covenant, running with the land, prohibiting occupancy of certain property by any person not wholly of the "white or Caucasian race."

The complaint was filed in the Superior Court of Los Angeles County. It alleged that the three petitioners and the respondent, on February 2, 1950, were each owners of parcels of land in Los Angeles covered by a restrictive covenant recorded in May 1945 (R. 1-2). The covenant provided that if any parcel were ever occupied by a person not wholly of the "white or Caucasian race," the owner who covenanted as to that lot, or his successor in interest, would be liable in damages to the other owners (R. 3). Respondent sold and conveyed her lot to others on February 2, 1950 and moved out of the property on September 3, 1950, allegedly in order to permit persons not of the Caucasian race to occupy it; such persons did occupy it on and after September 4, 1950 (R. 4-5). As a result of respondent's violation of the contract, petitioners were allegedly damaged in the total sum of $11,600 (R. 5). Petitioners prayed damages, costs and further just relief (R. 6-7).

Respondent demurred to the complaint on the ground that it stated no cause of action because entertainment of the suit would deny respondent equal protection of the laws and due process of law as guaranteed by the Fourteenth Amendment (R. 7-8). The Superior Court issued a judgment (R. 16) and opinion (R. 8-16) sustaining the demurrer. On appeal, the District Court of Appeal affirmed (R. 30-56). After denial of a petition for rehearing by the District Court of Appeal (R. 17-19), petitioners' petition for hearing by the Supreme Court of the State (19-30) was denied by that court (R. 58). Petitioners thereupon filed their petition for writ of certiorari.

## The Questions to Which This Brief Is Addressed

The sole issue in this case is whether an award of damages by a state court for violation of a racial restrictive covenant is prohibited by the Fourteenth Amendment to the United States Constitution. We concur in and do not here repeat respondent's argument that such an award of damages is barred by the Constitution because it constitutes enforcement of a racially discriminatory agreement. We address ourselves to two additional arguments that raise the following questions:

1. May the outcome of state judicial action be made to depend on race?

2. Does the award of damages for breach of discriminatory contracts constitute discrimination by the state because it necessarily tends to compel compliance with such contracts?

## Argument

The covenant that petitioners invoke here cannot be enforced by injunction since it is based on race, "simply that and nothing more." *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948). We submit that enforcement of the covenant by an award of damages is equally barred by the *Shelley* decision.

Petitioners urge that an award of damages does not effectuate racial discrimination because it leaves the Negro purchaser in possession of the property and merely adjusts rights between the white seller and his fellow white covenantors. On any theory, an award of damages for breach of contract is a form of enforcement of the contract. The *Shelley* case plainly barred any state enforcement of a discriminatory contract. The decision speaks throughout of "enforcement" generally, not of the particular form of enforcement there invoked. Hence, all court action is barred on a contract which, like this one, is discriminatory on its face.

That aspect of the case, however, is fully treated in respondent's brief. We therefore confine this brief to two additional considerations which, we believe, reenforce the broad ban of the *Shelley* decision.

## POINT ONE

**State judicial action violates the Fourteenth Amendment to the United States Constitution if its outcome is made to depend on race.**

An award of money damages for violation of a racial restrictive covenant requires the courts to take legal notice of race and to adjudicate legal consequences on the basis of race. If a vendor sells to one person he is not required to respond in damages to his fellow covenantors; if he sells to another, an award of damages may be made. The factor determining whether the seller is liable in damages is the color of the buyer's skin. This means that the state, acting through its judiciary, is shaping its action on the basis of race and imposing legal consequences for a difference in race. This, we submit, neither the Federal government nor state governments may constitutionally do. While they may under some circumstances recognize the existence of racial differences, they may not attribute legal consequences to the constitutionally irrelevant fact of birth.*

We believe that this principle is required by the terms of the Fourteenth Amendment that prohibits state action denying "equal protection of the laws." The law is not applied equally when the outcome of a court proceeding depends on race. It is for that reason that this Court

---

* We recognize that in the Japanese Exclusion Cases (*Hirabayashi v. United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944)) this Court did permit governmental action based on race. We believe that those cases were wrongly decided. In any case, they permit exceptions to the broad principle stated above only in the extreme case of war and threatened invasion.

early declared, in *Strauder* v. *West Virginia*, 100 U. S. 303, 307 (1880), "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."

It follows from this that the courts cannot entertain the argument that an award of damages in this case would operate only to compensate those who have sustained an alleged loss because of respondent's failure to comply with discriminatory restrictions. Petitioners have suffered no loss of which the courts may constitutionally take notice. Any reliance on alleged differences in the monetary value of property in racially restricted and racially open neighborhoods must be based on the false premise that the power of the state can be invoked to perpetuate racial distinctions and to preserve values based on such distinctions. Since the covenantors may not demand such action by the state, they have no rightful basis upon which to build any difference in value.

This, we submit, is implicit in the decisions of this Court that condemned ordinances designed to preserve separate white and Negro neighborhoods under the guise of "zoning." *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930). These cases, of course, did not generally condemn ordinances designed to enhance property values. There is no question that a municipality may enact ordinances for the protection and preservation of legally recognized property values. The decisions, by refusing to permit racial zoning, declared in effect that

there was no property right in the maintenance of racially segregated neighborhoods that the state, by zoning or by judicial action, could protect.

We recognize that, in urging this Court to condemn all governmental imposition of legal consequences upon the basis of race, we are asking it to go further than it has heretofore gone. Yet this Court has long recognized that, under the First Amendment, legal consequences may not be created on the basis of differences in religion and that government in the United States, by its very nature, "is necessarily undenominational." *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908). Under our constitutional system, religion has from the very beginning been declared to be beyond the "cognizance" of government. Madison's Memorial and Remonstrance, annexed as an appendix to Mr. Justice Rutledge's dissent in *People ex rel. Everson* v. *Ewing*, 330 U. S. 1, 63 (1947). We respectfully urge that, at least since the adoption of the Fourteenth Amendment, race is beyond the cognizance of government and that the time has come for this Court to declare that proposition and make it explicit.

## POINT TWO

**An award of damages for breach of a racially discriminatory contract constitutes denial of equal protection of the laws by the state because it necessarily tends to compel compliance with such contracts.**

If the courts were open to suits for damages against those who refuse to give effect to oppressive covenant restrictions, the threat of court process would act as a continuing restraint—a restraint upon free, non-discriminatory sale of homes that would be imposed by public sanction. For constitutional purposes, it makes no difference that the restraint would be imposed on those who desire to sell their property to the minority group buyer rather than on the buyer himself. No one would defend the constitutionality of a statute that penalized persons who employed Negroes or Jews, even though the injured group would not directly feel the rod of "state action." Indeed, just such a statute, directed against aliens, was stricken down by this Court in *Truax* v. *Raich*, 239 U. S. 33 (1915).

*Buchanan* v. *Warley*, 245 U. S. 60 (1917) presented a situation even closer to the instant case. The white plaintiff there had contracted to sell land to the Negro defendant. The plaintiff sued for specific performance of the contract. The Negro defendant set up as a defense an ordinance which, if valid, would have prohibited his occupancy of the property because of his race. This Court held the ordinance unconstitutional, despite the fact that the person regulated by the ordinance was white and the only Negro in the case was asserting its validity. It was

argued that the white plaintiff could not raise the constitutional issue because that could be done only "by those whose rights are directly affected by the law or ordinance in question" (245 U. S. at 72). The Court found this requirement satisfied by the fact that the ordinance interfered with the property rights of the white seller (*Id.*, at 72-73). It then went on to condemn the ordinance because it impaired "the civil right of a white man to dispose of his property if he saw fit to do so to a person of color . . ." (*Id.*, at 81).

The *Buchanan* case plainly establishes that the Constitution guarantees to respondent here and to all property owners the right to sell their property to members of minority groups, free of restraint by state action. It is irrelevant that the law suit here is by a white person against another white person and does not directly affect the ownership or occupation of the parcel in question by Negroes. The effect of this form of state action is to restrain the sale of property by whites to Negroes. Hence, it is within the prohibition of the Fourteenth Amendment.

It may well be argued that the mere threat of court process—any kind of court process—is a deterrent upon action. "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death." ("The Deficiencies of Trials to Reach the Heart of the Matter", Learned Hand, 3 Lectures on Legal Topics 89, 105 (1926).) In this case the white seller has been sued by three of her former co-covenantors for a sum totalling $11,600. If this suit were successful, she would be open to further suits by other owners of the parcels covered by the covenant. Her case would stand as a grim warning to other property owners of what they could

expect from the courts if they presume to ignore discriminatory restraints.

Respondent here is faced with more than the mere harrassment of legal process. The state is being asked to force her to pay damages because of conduct that the state may not restrain. This Court is being asked to sanction a rule of law that would restrain for the future other property owners situated as respondent was. To say that no restraint by "state action" is involved is to misconceive the effect if not the purpose of our system of contract law.

Primitive legal systems may give no effect whatever to agreements, leaving the parties to voluntary compliance. Our legal system, however, does enforce contracts. In the words of Professor Cohen, "Contract law is commonly supposed to enforce promises." ("The Basis of Contract," Morris R. Cohen, 46 Harvard Law Review 553, 571 (1931).) The "contract law" to which he refers plainly includes those rules that require the payment of damages when a contract is violated. The law is concerned not only with what Professor Llewellyn calls the "hospital cases" that require direct court action but also with the multitude of everyday transactions that are shaped by the courts' decisions. ("What Price Contract?". K. N. Llewellyn, 40 Yale Law Journal 704, 725, note 47 (1931).)

We believe that it can be shown that the law provides for damages in large part for the very purpose of making them unnecessary by inducing general compliance. Even if that is not the purpose of the rule, it is certainly its effect. Thus the Restatement of the Law of Contracts, while formulating a general rule that damages are meas-

ured by their remedial effect only, recognizes nevertheless that "All damages are in some degree punitive and preventive . . ." (Restatement of the Law of Contracts, Section 342, Comment a, Vol. I, page 561). Justice Holmes similarly recognized that "Any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine" (dissenting in *Bailey* v. *Alabama*, 219 U. S. 219, 246 (1911)).

Moreover, even within the "remedial" theory of contract damages, the law is compelled to make a choice of the extent of the remedy. That choice is guided by considerations of the relative deterrent effects. A classic analysis of the theory of damages makes this clear. In "The Reliance Interest in Contract Damages," L. L. Fuller and Wm. R. Perdue Jr., 46 Yale Law Journal 52 (1936), the authors point out that the law gives the disappointed promisee more than the damage he has suffered by entering into a contract that was later violated. It remedies also his "expectation interest," that is, what he would have gained from the contract had it been performed, even where that gain is one he would never have had if there had been no contract. Analyzing "the reasons which underlie (or may underlie) the enforcement of promises generally" (at 53), the authors explain the choice of the higher measure of damages as follows (at 61):

> "Since the expectation interest furnishes a more easily administered measure of recovery than the reliance interest, it will in practice offer *a more effective sanction against contract breach.* It is therefore possible to view the rule measuring damages by the expectancy in a quasi-criminal aspect, its purpose

being not so much to compensate the promisee as to penalize breach of promise by the promisor. The rule enforcing the unrelied-on promise finds the same justification, on this theory, as an ordinance which fines a man for driving through a stop-light when no other vehicle is in sight." (Emphasis supplied.)

Plainly then, the determination of the measure of damages is based on preventive considerations:

"It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of the stop-light ordinance we are interested not only in preventing collisions but in speeding traffic." (*Ibid.*)

Similarly, Professor Cohen has recognized as at least "one phase" of contract law, "strengthening the security of transactions by enabling men to rely more fully on promises" (*op. cit. supra,* at 584). He concludes (*Id.,* at 585-586):

"It is an error then to speak of the law of contract as if it merely allows people to do things. The absence of criminal prohibitions will do that much. The law of contract plays a more positive role in social life; and this is seen when the organized force of the state is brought into play to compel the loser of a suit to pay or to do something. Doubtless most people live up to their promises or agreements either through force of custom or because it is in the long run more advantageous to do so. But there can be no doubt that the possibility of the law's being invoked against us if we fail to do so is an actual factor in the situation."

Dean Pound considers the damage award as one force, and often the only force, used by the law to obtain observance of the interests it seeks to protect.

> "Law secures interests by punishment, by prevention, by specific redress and by substitutional redress; and the wit of man has discovered no further possibilities of judicial action. . . . Hence, in the great majority of cases substitutional redress by way of money damages is the only resource, and this has been the staple remedy of the law at all times." ("The Limits of Effective Legal Action," Roscoe Pound, III American Bar Association Journal 55, 67 (1917).)

The law does not, however, enforce all agreements. Some are declared illegal and the law may not only withhold enforcement but prevent performance. Many others are simply unenforceable, most commonly because they are so informal that it is not regarded as desirable to use the powers of the state to hold the promisor to his word. In the present situation, enforcement must be withheld because of a constitutional command against the use of "the full coercive power of government to deny . . . , on the grounds of race or color, the enjoyment of property rights. . . ." (*Shelley* case, *supra*, 334 U. S. at 19).

The essence of the *Shelley* decision is its distinction between "Participation of the State . . . in the enforcement of the restrictions" and "voluntary adherence to their terms" (*Id.* at 13). This of course is the same distinction made by Professor Cohen between a rule that "merely allows people to do things" and one that uses "the organized force of the state." Racial restrictive covenants would necessarily bear "the clear and unmistakable imprimatur of the State" (*Id.* at 20), if they were made the basis for invoking court process, for judicial

proceedings to determine whether parties have complied and for damage awards where the courts find they have not. Certainly it could not then be said that "the States have merely abstained from action" (*Id.* at 19).

If this Court upholds the suit for damages in this case, racial restrictive covenants will continue to prevent the free sale of property to minority groups; they will do so because of restraints imposed by state action. We respectfully submit that this outcome is plainly barred by this Court's decision in the *Shelley* case.

## CONCLUSION

**It is respectfully submitted that the decision below should be affirmed.**

National Community Relations
Advisory Council, by
Irving Kane,
I. H. Prinzmetal,
Lewis H. Weinstein,
Herman L. Weisman,
*Attorneys.*

Will Maslow
Leo Pfeffer
Joseph B. Robison
*of Counsel*

April, 1953